IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

BIODIVERSITY CONSERVATION ALLIANCE, Petitioner, vs. BUREAU OF LAND MANAGEMENT, a Bureau within the Department of Interior; JOHN RUHS, BLM High Desert District Manager, in his official capacity, Respondents, LOST CREEK ISR, LLC and STATE OF WYOMING, Respondent-Intervenors.	Case No. 2:12-CV-252-SWS

ORDER UPHOLDING AGENCY ACTION

This matter comes before the Court on a *Petition for Review* (ECF No. 1) challenging the decision by the Bureau of Land Management ("BLM") to authorize the Lost Creek In-Situ Uranium Recovery Project ("Project"), a uranium mining project in Sweetwater County, Wyoming. The Court, having reviewed the Administrative Record and considered the briefs and materials submitted in support of the Petition and the responses thereto, having heard oral argument of counsel and being otherwise fully advised, FINDS and ORDERS as follows:

BACKGROUND

The Energy Policy Act of 2005 calls for federal agencies "to develop a national energy policy designed to help the private sector, and, as necessary and appropriate, State and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy for the future." (A.R. 37832, Final Environmental Impact Statement ("FEIS") at ES-2.) "Expanding nuclear power is a key component of the Energy Policy Act." (*Id.*) "Exploration and development of locatable federal minerals by private industry is part of BLM's minerals program under the authority of 43 CFR 3800, Mining Claims Under the General Mining Laws, the Mining and Minerals Policy Act of 1970, the Federal Land Policy and Management Act of 1976 (FLPMA), and the National Materials and Minerals Policy, Research, and Development Act of 1980." (*Id.*)

The challenged Project consists of the construction, operation, and reclamation of facilities for *In-Situ* Recovery ("ISR") operations within the Lost Creek Permit Area. The ISR operation involves the construction of a series of injection wells that would be used to pump a recovery solution known as a lixiviant into the ground in the uranium bearing sandstone, which in this case is about 350 to 500 feet below the ground surface. (A.R. 39248, Record of Decision ("ROD") at 10; A.R. 37926, FEIS at 2-4). These injection and production wells are then surrounded by a ring of monitoring wells to extract water quality samples to ensure no excursion of the lixiviant outside the production area. (A.R. 37926, FEIS at 2-4). The lixiviant oxidizes the uranium mineral allowing it to dissolve into a recovery solution which becomes uranium laden. (A.R. 39248, ROD at 10.) This recovery solution is then removed by production wells that are located within the series of injection wells. (*Id.*) The uranium laden lixiviant is then pumped through buried pipelines to a plant for processing. At the plant the uranium is removed from the recovery solution (lixiviant) using ion exchange resins and prepared for shipment as either a "yellowcake" slurry or dried yellowcake. (*Id.*) The recovery solution is then recycled. The Plan of Operations initially contemplated transportation of the slurry from the site via U.S. Department of Transportation approved containers to a facility for processing the slurry into dry yellowcake. (A.R. 02743.) However, BLM ultimately selected the "Drying Yellowcake On-Site Alternative" for the Project in an effort to reduce truck traffic associated with shipping the slurry off-site for drying. (A.R. 39250, ROD at 12.) The Project is contemplated to occur over a 12-year period, seven months for initial construction, seven years for production, and the remaining time for final reclamation. (A.R. 37831, FEIS at ES-1.) It is anticipated that approximately six million pounds of uranium will be produced from the Permit Area. (*Id.*)

The Permit Area is located in northeast Sweetwater County, south-central Wyoming, where the nearest population center, Bairoil (population approximately 100), is 15 miles to the northeast. The Permit Area is about 21 miles from the nearest state highway, and there are no publicly maintained roads within the Permit Area. (A.R. 37831, FEIS at ES-1.) The Permit Area covers about 4,254 acres – eighty-five percent public land managed by the BLM and fifteen percent owned by the State of Wyoming – and includes 201 unpatented federal lode mining claims and a State of Wyoming mineral lease. (A.R. 37832, FEIS at ES-2.) Total surface disturbance from the Project is expected to be about 345 acres (*id.*), which includes construction of a uranium processing facility ("the Plant") and the construction/upgrade of two main access roads (A.R. at 37927, 37934). The

Permit Area is also located within a Core Area for Greater sage-grouse, a candidate for federal listing under the Endangered Species Act ("ESA") (A.R. at 38266, 38288), and includes important habitat for the Wyoming pocket gopher and pygmy rabbit (A.R. at 38288). All three of these species are designated as BLM Sensitive Species (A.R. at 38289-90).

To further ongoing efforts to conserve the Greater sage-grouse in Wyoming and to avoid an ESA listing, the Governor of Wyoming issued Executive Order 2011-5 for Greater Sage-Grouse Core Area Protection ("EO"). (A.R. 19527.) The EO directs state agencies to "focus on the maintenance and enhancement of Greater Sage-Grouse habitats, populations and connectivity areas" (A.R. 19528), and provides that "[n]ew development or land uses within Core Population Areas should be authorized or conducted only when it can be demonstrated that the activity will not cause declines in Greater Sage-Grouse populations" (A.R. 19529). On February 10, 2012, the BLM's State Director for Wyoming issued an Instruction Memorandum ("IM") to provide guidance to BLM Wyoming Field Offices regarding management consideration of Greater Sage-Grouse habitats. (Pet'r's Ex. 4, Mem. in Supp. of Mot. for Prelim. Inj.) (ECF No. 9-8).[1] The IM states BLM Wyoming's policy "to manage Greater Sage-Grouse seasonal habitats and maintain connectivity in identified areas in support of the population management objectives set by the State of Wyoming." (*Id*. at 1.) The IM further states the guidance set forth therein is consistent with "guidelines and recommendations" provided for in the Wyoming Governor's EO 2011-5. (*Id*. at 1-2.)

The IM and EO set forth various conservation measures and stipulations relating to timing,

[1] Although listed in BLM's Index to the Administrative Record (ECF No. 49 at 42), no bates number is identified for this document. The document was attached as Exhibit 4 to *Petitioner's Memorandum in Support of Motion for Preliminary Injunction* (ECF No. 9).

distance, surface disturbance, and density in connection with development activities in core areas. For example:

> Surface occupancy and/or disruptive activities are prohibited on or within a six tenths (0.6) mile radius of the perimeter of occupied sage-grouse leks. For the purposes of implementation of this policy, [Field Offices] must consider and evaluate an alternative that would not allow new surface facilities, including roads, to be authorized within a 0.6-mile buffer around occupied core or connectivity leks. (IM at 4.)
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> Locate main roads used to transport production and/or waste products > 1.9 miles from the perimeter of occupied sage-grouse leks. Locate other roads used to provide facility site access and maintenance > 0.6 miles from the perimeter of occupied sage-grouse leks. (EO at 9.)
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> [C]onsider and evaluate measures that limit or reduce the density of oil and gas or mining activities to no more than an average of 1 location per 640 acres; and to limit all surface disturbance (any program area) to no more than 5 percent of the core landscape . . . . (IM at 6.)

Notwithstanding the stipulations, the EO expressly authorizes consideration of exceptions on a case-by-case basis where it can be shown the exception "will not cause declines in sage-grouse populations." (A.R. 19538, EO at 12.) The IM provides that, for Plans of Operations relating to locatable mineral activities, the BLM Authorized Officer "may notify the operator of ways that they may minimize impacts to core area habitats and request the operator to amend its notice or plan to include such measures." (IM at 18.) An operator's compliance with the requested conservation measures is not mandatory. (*Id*. at 18-19.)

Ur-Energy USA Inc. and Lost Creek ISR, LLC (collectively "LCI") acquired the mining claims in 2005, conducted baseline environmental data collection for approximately a year and in 2007 began the five-year federal and State permitting processes. (11/30/12 Cash Aff. ¶ 2) (ECF No.

16-1). In the course of LCI's development of the Project, various State and federal agencies reviewed and evaluated the environmental effects associated with the proposed action. On December 20, 2007, LCI submitted a mining permit application to the Wyoming Department of Environmental Quality ("WDEQ") for the Lost Creek Project. (Nuttbrock Aff. ¶ 6) (ECF No. 22-1). The State permitting process "is an extremely thorough and extensive evaluation of proposed mining facilities, potential impacts from such facilities, and measures to assure that the facility's operation will not result in injury to human health or the environment." (*Id*. ¶ 16.) The WDEQ provided seven rounds of comments during its evaluation, in which it analyzed in detail the area's hydrological and geological resources and how the Project would impact those resources. (*Id.* ¶¶ 7-8.) WDEQ and LCI agreed to several permit conditions that allowed the division to assure itself that the Project would contain all operational fluids. (*Id.* ¶ 8.) The WDEQ was also concerned with the Project's potential impacts on sage grouse and relied on the Wyoming Game and Fish Department ("WGFD") to evaluate any impacts and make recommendations for the proposed permit. (*Id*. ¶ 12.)

In February 2011, the WDEQ determined the application was technically adequate and authorized LCI to publish the permit for public notice. (*Id*. ¶ 7.) During the public comment process, WDEQ received objections from the Wyoming Outdoor Council ("WOC") questioning whether the permit contained adequate controls to control fluids and whether the Project complied with the Governor's EO 2011-5 for Greater Sage-Grouse Core Area Protection. (*Id*. ¶ 13.) Following a two-day hearing in early August 2011, the Wyoming Environmental Quality Council overruled the objections and directed WDEQ to issue the permit. (*Id*. ¶ 14; A.R. 33200.)

Uranium, as a "source" material under the Atomic Energy Act, 42 U.S.C. § 2014(z), is regulated by the U.S. Nuclear Regulatory Commission ("NRC"). The NRC issues licenses for the possession and use of source material provided that the facilities meet NRC regulatory requirements and would be operated in a manner that is protective of public health and safety and the environment. (A.R. 32206.) Pursuant to its environmental protection regulations, NRC is required to prepare an environmental impact statement ("EIS") or a supplement to an EIS ("SEIS") before issuing a license to possess and use source material for uranium milling. 10 C.F.R. § 51.20(b)(8). In 2009, NRC released a regional analysis, the "Generic Environmental Impact Statement for *In-Situ* Leach Uranium Mining Facilities" ("GEIS"), that analyzed common potential environmental impacts associated with the construction, operation, aquifer restoration, and decommissioning of an ISL uranium recovery facility in four geographic regions in the West, including Wyoming. (A.R. 24455, 24457.) The NRC developed the GEIS based on its experience in licensing and regulating ISL facilities over the past 30 years, and with the active participation of the WDEQ, and public comments. (*Id*.) In June 2011, the NRC released a supplement to the GEIS to evaluate the potential site-specific impacts of the Lost Creek Project. (A.R. 32205.) Based on its environmental review, the NRC recommended the source material license be issued for the Project. (A.R. 32206.)

Uranium, as a locatable mineral under the Mining Law of 1872 (30 U.S.C. § 22 *et seq.*), is subject to BLM surface management under FLPMA. 43 C.F.R. Subpart 3809. In November 2009, LCI submitted a Plan of Operations to BLM triggering BLM's review pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq*. (A.R. 37832, FEIS at ES-2.) BLM's regulations contemplate "maximum possible coordination with appropriate State agencies to avoid duplication and to ensure that operators prevent unnecessary or undue degradation of public lands." 43 C.F.R. § 3809.1(b). In addition to considering WDEQ's Permit to Mine and NRC's GEIS and SEIS for the Project, "[i]n order to support the BLM's NEPA requirements and regulatory authorities, the BLM prepared [an] EIS to focus on the issues and mitigation measures not analyzed in sufficient detail in the NRC NEPA documents." (A.R. 37832, FEIS at ES-2.) BLM published a notice of intent to prepare an EIS on February 11, 2011, commencing the public scoping period. (A.R. 37916.) BLM issued the draft EIS for the Lost Creek Project on April 27, 2012, took public comments, and issued the FEIS on August 17, 2012. (A.R. 37916, 39239.) BLM's Record of Decision for the Lost Creek Uranium *In-Situ* Recovery Project ("ROD") was signed on October 5, 2012. (A.R. 39270). BLM determined "implementation of this Decision, with the specified environmental protection measures and monitoring, will allow LCI to mine a valuable uranium deposit under the authority of the U.S. mining laws, while ensuring that operations are conducted in a manner that prevents unnecessary or undue degradation of public lands in conformance with BLM requirements." (A.R. 39238, ROD at iv.)

Biodiversity Conservation Alliance filed its Petition for Review on November 8, 2012, alleging BLM failed to comply with NEPA and FLPMA requirements, making BLM's decision to approve and authorize the Lost Creek Project arbitrary, capricious, an abuse of discretion, and not in accordance with the law. (Pet. at 4-5) (ECF No. 1).

STANDARD OF REVIEW

Because neither NEPA nor FLPMA create a private right of action, the Court reviews this challenge to BLM's final agency action under the Administrative Procedures Act ("APA"). *See*

Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs, 702 F.3d 1156, 1165 (10th Cir. 2012); *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 719 (10th Cir. 2009). Under the APA, a court reviews agency action to determine whether the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency's decision is arbitrary and capricious if the agency

> (1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment.

Western Watersheds Project v. BLM, 721 F.3d 1264, 1273 (10th Cir. 2013) (quoting *New Mexico*, 565 F.3d at 704). The scope of review under the "arbitrary and capricious" standard is narrow, and the court is not to substitute its judgment for that of the agency. *Colorado Wild, Heartwood v. U.S.F.S.*, 435 F.3d 1204, 1213 (10th Cir. 2006) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The Court's inquiry under the APA "must be thorough, but the standard of review is very deferential to the agency. A presumption of validity attaches to the agency action and the burden of proof rests with the parties who challenge such action." *Hillsdale Envtl.*, 702 F.3d at 1165 (internal quotations and citations omitted); *and see Western Watersheds*, 721 F.3d at 1273.

DISCUSSION

Petitioner raises four primary arguments in support of its request to vacate and remand BLM's decision to authorize the Lost Creek Project: (a) BLM failed to fully analyze the cumulative impacts from LCI's "proposal" to operate the Lost Creek facility as a regional uranium processing plant; (b) BLM failed to consider all relevant factors and evidence in attempting to mitigate harm to the sage-grouse; (c) the FEIS failed to analyze the effectiveness of the mitigation measures; and (d) BLM failed to consider all relevant factors and evidence regarding the Wyoming pocket gopher.

A. Analysis of Cumulative Impacts from Project

NEPA regulations require an assessment of cumulative impacts. 40 C.F.R. § 1508.25(c)(3). Cumulative impacts are those resulting "from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Id*. § 1508.7. In *Kleppe v. Sierra Club*, 427 U.S. 390, 413-14 (1976), the Supreme Court stated the "determination of the extent and effect of [cumulative impacts] . . . is a task assigned to the special competency of the appropriate agencies." *Id*. at 414. With respect to the Lost Creek Project, BLM explained: "The analyses of the cumulative impacts were based on publicly available information on existing and proposed projects, general knowledge of the conditions in Wyoming, and reasonably foreseeable changes to existing conditions. (A.R. 38619, FEIS 5-2.)

(1) Cumulative Impacts from Increased Production and Processing and other LCI Projects

Petitioner's argument in this regard is premised upon the assertion that LCI plans to double uranium production and operate the Lost Creek facility as a regional uranium processing plant, processing not just the uranium ore under the Project site, but also from a variety of sources across the region. To be sure, numerous references in the record indicate LCI's aspiration and preparation to use the Plant in the future for processing uranium-laden resins from other LCI projects or ISR facilities in the region. (*See* A.R. 02784, 25739, 37831, 37910, 38620-21, 38636, 39243.) Petitioner cites specifically to an April 2013 NRC Notice in which the NRC announced its intent to amend LCI's Source Materials License to add a vacuum dryer circuit and increase the authorized maximum production (processing) rate at the Plant from 1 million pounds to 2 million pounds of dry yellowcake per year. NRC, 78 Fed. Reg. 20146-48 (April 3, 2013) (environmental assessment and finding of no significant impact for license amendment). The Notice states: "The licensee intends to increase production of yellowcake at the facility by accepting equivalent feed including loaded (uranium-laden) resin from other uranium recovery facilities, including potential future satellite facilities, but has *not requested a license amendment to increase the flow rate at the Lost Creek wellfields*." *Id.* at 20147 (emphasis added).

Although characterized by Petitioner as a "proposal" to double production, LCI's application to the NRC simply requested amendment of its license "to include yellowcake rotary vacuum drying as an option within the CPP [Central Processing Plant] at the Lost Creek ISR Facility, and subsequent offsite shipment of vacuum dried yellowcake" (*id.*), which was required to conform to BLM's preferred alternative of "drying yellowcake on-site" (A.R. 39250).[2] LCI proposed the drying circuit include two separate drying systems to allow flexibility to vary the output of dried product "in the case of increased production rates or changes in scheduled maintenance." (A.R. 33216.) The NRC determined the proposed action to include yellowcake rotary vacuum drying in the Plant, and subsequent offsite shipment of dried yellowcake, "is not expected to result in significant additional impacts to the environment" because:

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[2] In the FEIS, BLM acknowledged that "[p]rior to constructing, installing and operating a yellowcake drying-packing facility, the NRC License and WDEQ-LQD Permit to Mine would both require modification with review and approval by those agencies." (A.R. 37988.)

> (1) The licensee intends to increase dry yellowcake production *in the future* by accepting equivalent feed including loaded resins from other uranium recovery facilities and potential future satellite facilities, this would not affect the flow rate from the existing Lost Creek well fields; and (2) the dryers would be installed in a pre-existing space inside the CPP (identified in the existing license), there would be no physical changes to the footprint or structure of the building.

78 Fed. Reg. 20147 (emphasis added).

Petitioner argues BLM failed to consider and evaluate the cumulative impacts of LCI's plan to double production, specifically by importing uranium resins from off-site sources, undermining the assertions of the environmental benefits of on-site processing.[3] The FEIS contemplates, and the ROD authorizes, in-situ operations for the recovery and production of up to one million pounds per year from the Lost Creek Permit Area – about six million pounds of uranium produced over a seven year period. (*See* A.R. 02784, 37831, 38014.) In the ROD, BLM addressed LCI's stated intent to develop the Lost Creek East Area:

> Because LCI has not prepared or submitted a proposed plan modification to BLM, there is insufficient information to address this expansion in the FEIS, as the development extent is speculative at this time. *This ROD does not make any decision on activities pursuant to this or any other amendment to the LCI NRC license.* Any development activity in this area will be covered by *a separate NEPA analysis and decision*. Development of the Lost Creek East Area was appropriately considered in the Cumulative Effects section of the FEIS.

(A.R. 39243, ROD at 5) (emphasis added).

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[3] In selecting the "Drying Yellowcake On-Site Alternative" as the Preferred Alternative, BLM explained, "Use of a dryer would also result in fewer shipments from the site due to the difference in volume between yellowcake slurry and dried yellowcake. Fewer shipments would reduce traffic impacts, including the risk of transportation accidents and wildlife disturbance and collisions, and also reduce air quality impacts from travel on unpaved roads." (A.R. 39250, ROD at 12.)

BLM further indicated its awareness that LCI designed the Plant to accommodate the processing of uranium-laded resins from future satellite facilities operated by LCI or from third-party facilities. (A.R. 37831, FEIS at ES-1; A.R. 37910, FEIS at 1-9; A.R. 38620-21, FEIS 5-3 - 5-4; A.R. 38630, FEIS at 5-13.) However, at oral argument, Petitioner and each of the Respondents acknowledged the ROD does not authorize expansion of Lost Creek to adjacent sites, nor does it authorize satellite facilities or transportation of off-site material from any other facility into the Lost Creek Plant. With respect to such future activities, BLM stated:

> *With appropriate regulatory approval*, the Plant could also be used to process ion exchange resins from other ISR mines in the region *after completion of mineral recovery in the Permit Area*. (A.R. 37831) (emphasis added).
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> The proposed Plant is designed to accommodate truckloads of loaded resins from future satellite facilities operated by LCI or its affiliates and/or from third-party facilities. . . . At this time, other satellite facilities are in the *exploration stage*, with potential for three additional ISR projects to be developed in the next 20 years. Because these potential projects do not have mining plans developed, additional uranium mining is being considered in the cumulative impacts. The types of activities at these other mines would be similar to those proposed at the Permit Area, and would be analyzed in *separate NEPA analyses* tiered to this document. (A.R. 37910) (emphasis added).
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> The Proposed Action includes continued use of the Plant over the next 20 years for other LCI projects . . . . If another operator develops an ISR project in the north central portion of the Great Divide Basin . . . that operator could potentially request a toll milling arrangement with LCI to use the LCI Plant. This would depend on Plant capacity and *would require revision of both the NRC License and the WDEQ-LQD Permit to Mine, as well as BLM project approval*. Most other uranium operators interested in projects in this part of Wyoming already have plants established elsewhere. Therefore, until the Lost Creek Plant became available for toll milling, those operators could be reasonably expected to use their existing plants rather than building another new Plant in the north central portion of the Great Divide Basin. If the Plant were permitted for use by another ISR operation, that would extend the time frame prior to Final Reclamation of the Plant and associated facilities . . . . [S]imilar requirements for minimizing operational footprints and other

> environmental protection measures (e.g., using existing roads if possible and reseeding with a native seed mix) would be required of all energy-related operations. (A.R. 38620-21) (emphasis added).
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> *If* another ISR project were developed, it is anticipated that the overall traffic volume would be less than for the proposed action because another plant would not be built; the ore processing would occur at the Lost Creek Plant. The ore-laden fluids from the mine unit(s) at the other ISR project *could be transported via truck or pipeline, depending on* distance from the Plant and fluid volumes. (A.R. 38630) (emphasis added).
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> *If* the Lost Creek Plant were permitted for use by another operation, that would extend the time frame prior to Final Reclamation of the Plant and associated facilities, i.e., about 85 acres would remain disturbed beyond the anticipated time frame. So would the disruptive activities such as delivery trucks in and out of the Plant, which could impact wildlife habitat and migration. (A.R. 38636.)
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> Noise generation of future projects *would largely depend on* the increased traffic, and construction and processing equipment used in the future projects. (A.R. 38639) (emphasis added).

LCI has not submitted a proposal to BLM to increase production at Lost Creek to two million pounds, nor has it entered into any contracts with any party for toll milling. LCI has not submitted a proposal to BLM or WDEQ-LQD to expand Lost Creek to include adjacent properties. Thus, the parameters of any future development or processing activities are contingent and subject to changes in circumstances. (A.R. 38624) ("regulatory approval from NRC and WDEQ-LQD for developing the deeper deposits and for the adjacent properties must also be obtained;" letters of intent from potential operators to the NRC are "subject to change by the operators, and many projects have been delayed or put on hold"). Still, Petitioner argues the "proposed" doubling of production and processing of equivalent feed from other uranium sources are reasonably foreseeable activities which should have been analyzed.

The Tenth Circuit test for determining whether particular actions could be considered cumulative impacts of the proposed action is "whether the actions were so interdependent that it would be unwise or irrational to complete one without the others." *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1173 (10th Cir. 2002) (quoting *Airport Neighbors Alliance, Inc. v. U.S.*, 90 F.3d 426, 430 (10th Cir. 1996) (internal quotation omitted). In *Utahns for Better Transp.*, plaintiffs argued the Department of Transportation should have considered the cumulative impact of a future expansion of the proposed highway from four lanes to six. *Id*. at 1172. The appellate court concluded the project as planned and the possible addition of two lanes were not "so interdependent that it would be unwise or irrational to complete one without the other." *Id*. at 1173. Similarly, although the Lost Creek Plant was designed with a processing capacity to accommodate future growth, the construction and operation of the Lost Creek Project does not depend on any future expansion or additional processing; the Project has independent utility apart from any future developments.

BLM determined there were three reasonably foreseeable uranium projects, although no permit application has yet been submitted. (A.R. 38623.) Within the Cumulative Impacts section of the FEIS, BLM stated, "Within the next 20 years, LCI is currently planning to develop the deeper uranium deposits (the KM Horizon), which underlie the HJ Horizon within the current Lost Creek Permit Area, and two adjacent Lost Creek properties. . . . For the purposes of the cumulative impacts assessment, it has been assumed that these projects would be similar in scale to the Lost Creek Project and that they would be developed successively." (A.R. 38624.) BLM further noted, however, "regulatory approval from NRC and WDEQ-LQD for developing the deeper deposits and for the adjacent properties must also be obtained." (*Id*.) For those projects identified "in exploration," BLM indicated uncertainty as to whether production license and permit applications will ever be filed or what the actual scale of the projects would be. (*Id*.) "Without more specific information on the projects, including production horizon and schedule, impact assessment would be speculative. Therefore, the impact assessment includes the exploration impacts, but not production impacts, for these properties." (*Id*.) BLM further explained potential toll milling arrangements with LCI to use the LCI Plant "would depend on Plant capacity and would require revision of both the NRC License and the WDEQ-LQD Permit to Mine, as well as BLM project approval." (A.R. 38620-21.)

The Tenth Circuit does not require an agency to consider speculative impacts or actions in its cumulative impacts analysis. *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1253 (10th Cir. 2011) (citing *Safeguarding the Historic Hanscom Area's Irreplaceable Res., Inc. v. F.A.A.*, 651 F.3d 202, 218 (1st Cir. 2011) ("For NEPA purposes, an agency need not speculate about the possible effects of future actions that may or may not ensue.")). The record shows BLM acknowledged and addressed the potential increased processing of uranium at the Plant from other ISR mines in the region, but further analysis of the cumulative impacts from such activity would have been speculative because there are no present and detailed plans in this regard and, in any event, such activity would require additional regulatory approval. Under the arbitrary and capricious standard of review, this Court must give BLM's determination of the appropriate scope of the cumulative impacts analyses substantial deference. *See Utahns for Better Transp.*, 305 F.3d at 1173. Accordingly, the Court finds it was unnecessary for BLM to include a detailed discussion of the cumulative impacts from any potential future processing of equivalent feed from other ISR facilities in the region.

As this Court previously found, BLM set forth a comprehensive analysis of cumulative impacts, including historic, current and reasonably foreseeable future projects outside of the Lost Creek Project.[4] (A.R. 38618-44.) Despite the inchoate nature of the future LCI Projects identified as reasonably foreseeable, they were included in the cumulative impacts assessment, assuming each would be similar in scale to the Lost Creek Project, would be developed successively, and would utilize the infrastructure in the Lost Creek Permit Area. (A.R. 38624.) The FEIS discusses how historic, current, and planned uranium projects, in conjunction with various other activities, may impact land use, transportation, geology, soil, surface water, groundwater, vegetation, wildlife, wild horses, air quality, noise, historic and cultural resources, visual and scenic resources, socioeconomics, environmental justice, public and occupational health, and waste disposal. (A.R. 38623-44.) The Court finds BLM made "a reasonable, good faith, objective presentation of [cumulative] impacts sufficient to foster public participation and informed decision making." *Fuel Safe Washington v. F.E.R.C.*, 389 F.3d 1313, 1331 (10th Cir. 2004) (internal quotation omitted).

(2) Cumulative Impacts to Sage-Grouse and other Sensitive Species

In evaluating the cumulative impacts to wildlife, BLM recognized that if the Lost Creek Plant were permitted for use by another operation, about 85 acres would remain disturbed beyond the anticipated time frame prior to final reclamation, and "[s]o would the disruptive activities such as delivery trucks in and out of the Plant, which could impact wildlife habitat and migration." (A.R.

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[4] *Order Denying Motion for Preliminary Injunction* at 22-23 (ECF No. 57).

38636.) BLM determined these activities could have temporary cumulative impacts to wildlife, in that wildlife displaced from the Permit Area during construction and operation of the Project may also be affected by other projects in the broader area. BLM further determined, however, "long-term cumulative effects of the Project are expected to be minimal due to the planned revegetation." (*Id.*) Regarding the Greater sage-grouse specifically, BLM stated future exploration and development would be subject to review under the Governor's EO. "Under such review, the projects would be required to . . . implement measures to minimize potential cumulative impacts . . . ." (*Id.*) Petitioner argues BLM cannot rely on future "voluntary" mitigation measures to protect Greater sage-grouse and other sensitive species and, therefore, BLM should have fully reviewed the cumulative impacts from other planned activities in the area.

While NEPA requires that "mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated," it does not impose any substantive requirement that mitigation measures be implemented. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). Nevertheless, in the mining context, BLM has the authority and obligation under FLPMA to "take any action necessary to prevent unnecessary or undue degradation [UUD] of the [public] lands." 43 U.S.C. § 1732(b). BLM has defined UUD as conditions, activities, or practices that, *inter alia*, fail to comply with certain performance standards, the terms and conditions of an approved plan of operations, or other Federal and state laws related to environmental protection. 43 C.F.R. § 3809.5. Although the IM itself may not make suggested conservation measures mandatory, the Lost Creek ROD adopts and requires various mitigation measures and monitoring. (*See* A.R. 39252.) BLM determined that "implementation of [the ROD], *with the specified environmental protection measures and monitoring*, . . .[will ensure] that operations are conducted in a manner that prevents unnecessary or undue degradation of public lands . . . ." (A.R. 39238) (emphasis added).

Further, although the Court previously found BLM is not strictly bound by the provisions of the EO,[5] the EO states "[n]ew development or land uses within Core Population Areas should be authorized or conducted only when it can be demonstrated that the activity will not cause declines in Greater Sage-Grouse populations." (A.R. 19528.) As in this case, new uranium projects would need to obtain a permit to mine from the WDEQ. WYO. STAT. § 35-11-401(a). Both the Wyoming Game and Fish Department and the Governor of Wyoming determined the Lost Creek Project complies with the EO. (A.R. 00596; 38515-16.) "Agency-required [mitigation] measures and LCI's commitments and initiatives to comply with the applicable environmental statutory and regulatory programs have developed through several federal, state, and local permitting and licensing processes." (A.R. 39252.) Considering the exhaustive permitting process required by both Federal and state agencies prior to approval of the Lost Creek Project, it is reasonable for BLM to expect any future mining operations would be evaluated in the same manner as this operation, incorporating any necessary action (including mitigation measures) to prevent UUD.

B. Consideration of All Relevant Factors and Evidence Regarding Impacts to Sage-Grouse

This Court previously found BLM made a reasonable determination that the impacts to Greater sage-grouse habitat do not constitute UUD based on an extensive analysis in the FEIS and tiered to the NRC analysis.[6] There are no active leks in the Permit Area itself (A.R. 38267) and only one occupied active lek (which is outside the Permit Area) is within the 0.6 mile buffer zone of a road (A.R. 38518). Although surface occupancy could impact Greater sage-grouse occupation of existing leks within the buffer zone of a road, BLM confirmed upon a site visit that the natural topography blocks the road from view of the leks. (*Id*.) The Wyoming Game and Fish determined upgrading the existing two-track road would have less of an impact than creating a new road outside of the 0.6 mile buffer zone. (*Id*.)

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[5] *Order Denying Motion for Preliminary Injunction* at 19 (ECF No. 57).

Petitioner claims BLM failed to consider and respond to contradictory views regarding possible impacts to sage-grouse from traffic noise, allegedly ignoring the leading and most recent scientific studies. Specifically, Petitioner cites to two scientific studies which purportedly conclude that simply shielding leks from visual impacts, as opposed to the noise from daily truck and other traffic on the roads through/near the buffers, does not protect sage-grouse populations.[7] The first, authored by Dr. Gail L. Patricelli *et al*. and prepared for BLM ("Patricelli Report")[8] (A.R. 42129-53), recommends management of noise exceeding 10 dB over ambient *beyond* the perimeter of a lek, which is the boundary identified by current stipulations in the EO and relied on in the FEIS, that would include the "crucial lekking, nesting and early brood-rearing areas" (A.R. 42131). The

[6] *Order Denying Motion for Preliminary Injunction* at 20 (ECF No. 57).

[7] Petitioner did not reference either of these reports in its comments on the Draft EIS.

[8] Dr. Gail L. Patricelli, Jessica L. Blickley, and Dr. Stacie L. Hooper, *The impacts of noise on greater sage-grouse: A discussion of current management strategies in Wyoming with recommendations for further research and interim protections* (2012).

second, authored by Jessica L. Blickley *et al*. ("Blickley Report")[9] (A.R. 42169-79), suggested intermittent traffic/road noise is more disturbing to sage grouse than a relatively continuous drilling noise (A.R. 42177).

NEPA regulations require an agency to discuss in its FEIS "any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised." 40 C.F.R. § 1502.9(b). The Court is not convinced these two reports constitute a "responsible opposing view" warranting a specific discussion or response in the FEIS. First, the Blickley Report qualifies its conclusions by stating: "sage grouse *may* have associated road noise with potentially dangerous vehicular traffic and thus avoided traffic-noise leks more than drilling-noise leks[;] [a]lternatively, the pattern of decrease *may* indicate that an irregular noise is more disturbing to sage grouse than a relatively continuous noise." (A.R. 42177) (both emphasis added). The report also acknowledges the "results cannot be used to estimate the quantitative contribution of noise alone to observed decreases in Greater sage-grouse abundance at energy development sites because our experimental design may have led us to underestimate *or overestimate* the magnitude of these effects." (*Id*.) (emphasis added). An agency does not violate the requirement to discuss opposing viewpoints unless those views "directly challenge the scientific basis upon which the final EIS rests and which is central to it." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 1157, 1167 (9th Cir. 2003); *Habitat Educ. Ctr., Inc. v. Bosworth*, 363 F.Supp.2d 1070, 1083 (E.D. Wis. 2005).

[9] Jessica L. Blickley, Diane Blackwood, and Gail L. Patricelli, *Experimental Evidence for the Effects of Chronic Anthropogenic Noise on Abundance of Greater Sage-Grouse at Leks*, 26 CONSERVATION BIOLOGY NO. 3, 461-471 (2012).

Second, although the Patricelli Report recommends that noise exceeding 10 dB over ambient be managed as a "disruptive activity" *throughout* sage-grouse nesting and brood-rearing habitat and that roads should be sited (or traffic should be seasonally limited) within 0.7-0.8 miles from the edge of these areas, the report acknowledges "[f]urther research may find this [10 dB over ambient] threshold insufficient to protect sage-grouse – *or too stringent*." (A.R. 42130) (emphasis added). Also important is that the authors of the Patricelli Report offer "recommendations for consideration during revision and implementation of Resource Management Plans" (A.R. 42130), not as additional requirements for approving or challenging *this* specific mining plan of operations. Moreover, many of the interim measures the authors advocate are similar to those BLM has implemented according to the EO stipulations, including the continued use of the "10 dB above ambient" noise level,[10] the siting of roads away from leks, and seasonal and daily traffic limits. (*Compare* A.R. 38519 with A.R. 42131.) "Deference to the agency is especially strong where the challenged decisions involve technical or scientific matters within the agency's area of expertise." *Utah Envtl. Cong. v. Russell*, 518 F.3d 817, 824 (10th Cir. 2008). BLM is entitled to deference in its assessment of varying scientific opinions and ultimate decision to rely on the EO's sage-grouse noise guidance to measure compliance at the perimeter of the lek. *See Earth Island Inst. v. Carlton*, 626 F.3d 462, 473 (9th Cir. 2010) (NEPA does not require agency to "affirmatively present every uncertainty in its EIS," which would be "an onerous requirement, given that experts in every scientific field routinely disagree") (internal quotations omitted).

[10] The Patricelli Report acknowledges that this threshold is "based on the best available science to date[.]" (A.R. 42131.)

BLM is only required to "acknowledge and respond to comments by outside parties that raise *significant scientific uncertainties and reasonably support that such uncertainties exist.*" *League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1137 (9th Cir. 2010) (emphasis in original) (internal quotations omitted). Furthermore, an agency need not respond to every scientific study if it has otherwise taken a "hard look" at the issues raised by comments.[11] *See Biodiversity Conservation Alliance v. U.S. Forest Serv.*, 2012 WL 326435, No. 2:11-CV-226-SWS, at *10 (D. Wyo. July 27, 2012); *Earth Island Inst. v. Carlton*, 2012 WL 1130650 (E.D. Cal. Mar. 29, 2012); *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 668 (9th Cir. 2009). BLM recognized, considered, and addressed the impact of noise on the Greater sage-grouse in the Lost Creek FEIS:

> Based upon Greater sage-grouse research related to energy development, the most likely impacts would occur from human activity and disturbance. Primarily actions that are perceived by Greater sage-grouse either visually or auditorily would elicit a behavioral response from Greater sage-grouse. Thus, most disturbance issues would likely involve movement and noise. Traffic levels and speeds, traffic noise, machinery movement or noise, are examples of impact-inducing factors. Thus, protective practices would include options that can help reduce or eliminate disturbance issues. Practices to consider include[:] setting vehicle speed limits, traffic timing, reducing traffic, or sound reduction techniques, as well as other protective measures discussed above.

(A.R. 38498) (FEIS 4.9-9, Environmental Protection Measures, Monitoring and Impacts).

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[11] "NEPA prescribes the necessary process by which federal agencies must take a 'hard look' at the environmental consequences of the proposed courses of action. It imposes no substantive limits on agency conduct. Rather, once environmental concerns are adequately identified and evaluated by the agency, NEPA places no further constraint on agency actions." *Silverton Snowmobile Club v. USFS*, 433 F.3d 772, 780 (10th Cir. 2006) (internal quotations and citations omitted). "Once [a court is] satisfied that an agency's exercise of discretion is truly informed, [it] must defer to that informed discretion." *Utah Shared Access Alliance v. U.S.F.S.*, 288 F.3d 1205, 1213 (10th Cir. 2002).

BLM specifically acknowledged that traffic noise from the Project may adversely impact sage-grouse and anthropogenic noise can reduce lek attendance. (A.R. 38519.) BLM cited the stipulations requiring various mitigation measures to minimize the impacts: “noise should be limited to 10 dBA above ambient noise measured at the perimeter of a lek from 6 PM to 8AM during initiation of breeding (March 1 to May 15)).” (*Id.*) Additionally, BLM determined that noise from heavy construction equipment would be indistinguishable from the ambient wind noise at a distance of 1,000 feet,[12] and construction traffic is at least 1,320 feet distant from occupied leks, with the exception of Sooner Lek which is approximately 300 feet from the existing Sooner Road. (*Id.*) BLM explained Sooner Road was not expected to undergo any additional construction or improvements, so any increase in noise in the Sooner Lek area would be a result of increased traffic noise. (A.R. 38520.) Because the traffic on Sooner Road would be primarily commuter traffic rather than heavy equipment, the impacts to Greater sage-grouse were assessed using the lower commuter traffic noise level, the bulk of which would not occur in the time frame of most concern for Greater sage-grouse (6 PM to 8 AM). (*Id.*)

In Appendix F to the FEIS, BLM summarized the comments on traffic noise, noting Petitioner’s comment that “impacts of noise-generating equipment have not been analyzed at the level of lek sites or nesting habitat for sage grouse” (A.R. 39035) and further noting that “[s]everal commenters expressed concerns that the increased traffic in the area associated with the Project would have negative impacts on the Greater sage-grouse” (A.R. 39036-37). BLM referenced its

[12] Of the ambient sounds within the Permit Area, “wind produces the most common, intense, and persistent sounds.” (A.R. 38321.)

reliance on the EO/IM stipulations and recognized "a series of reports and studies . . . documenting the impact noise can have on lek populations." (A.R. 39035, 39037.) BLM then stated it "acknowledges that Greater sage-grouse are sensitive to noise and human disturbance that would be caused by increased traffic for the proposed Project operations." (A.R. 39037.) In response, BLM explained various mitigation measures designed to minimize the impacts to sage-grouse caused by noise: time restrictions on noise-generating activities; seasonal restrictions on construction activities; and annual wildlife monitoring. (A.R. 39037-38.) The record is clear that BLM took a "hard look" at the issues, adequately identifying and evaluating the impacts to sage-grouse from traffic noise in the Project Area. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). Petitioner's claimed deficiencies in this regard "are merely flyspecks" and are not "significant enough to defeat the goals of informed decision making and informed public comment." *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1163 (10th Cir. 2002).

C. Mitigation Measures

Petitioner contends BLM failed to analyze the effectiveness of the mitigation measures discussed in the FEIS. Recognizing this Court's preliminary ruling that "BLM developed and imposed a comprehensive set of mitigation measures,"[13] Petitioner argues BLM's discussion of mitigation measures violates NEPA because it fails to determine the *effectiveness* of each measure. In support, Petitioner cites to *South Fork Band Council v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009):

> An essential component of a reasonably complete mitigation discussion is an

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[13] *Order Denying Motion for Preliminary Injunction* at 22 (ECF No. 57).

> assessment of whether the proposed mitigation measures can be effective. *Compare Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1381 (9th Cir.1998) (disapproving an EIS that lacked such an assessment) *with Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 477 (9th Cir.2000) (upholding an EIS where "[e]ach mitigating process was evaluated separately and given an effectiveness rating"). The Supreme Court has required a mitigation discussion precisely for the purpose of evaluating whether anticipated environmental impacts can be avoided. *Methow Valley*, 490 U.S. at 351–52, 109 S.Ct. 1835 (citing 42 U.S.C. § 4332(C)(ii)). A mitigation discussion without at least some evaluation of effectiveness is useless in making that determination.

NEPA requires a "reasonably complete discussion of possible mitigation measures" so that the agency or other interested parties can properly evaluate the severity of the adverse effects. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). However, "[n]either NEPA nor FLPMA impose a procedural requirement for the BLM to verify the efficacy of mitigation measures in order for the BLM to utilize those measures to protect public lands from UUD." *Biodiversity Conservation Alliance v. BLM*, No. 09-CV-08-J, 2010 WL 3209444, at *20 (D. Wyo. June 10, 2010) (Johnson, J.). NEPA does not require "a fully developed plan that will mitigate environmental harm before an agency can act;" rather, NEPA requires only that "mitigation be discussed in sufficient detail to ensure that environmental consequences have been evaluated." *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1522 (10th Cir. 1992) (quoting *Methow Valley*, 490 U.S. at 352-53) (internal quotations omitted).

The Lost Creek FEIS contains a thorough discussion of environmental protection measures and why the measures are expected to mitigate impacts. (A.R. 38399-38614.) These mitigation measures include agency-required protection and monitoring measures (A.R. 39252-64), "additional measures" incorporated in response to comments received during the NEPA process (A.R. 39265-

66), and an Adaptive Management Plan to manage Greater sage-grouse populations (A.R. 38497-98). The Court finds BLM's discussion of mitigation measures is sufficient to evaluate the impacts from the Project and meet its NEPA responsibilities.

D. Consideration of All Relevant Factors and Evidence Regarding Wyoming Pocket Gopher

Finally, Petitioner contends BLM failed to consider "the leading scientific report" on the Wyoming pocket gopher, which is designated as a Sensitive Species that will be adversely affected by the Project. In denying Petitioner's request for a preliminary injunction, this Court found that, although the Project may impact this species in the area that is disturbed (8% of the Permit Area), the anticipated negligible effects are "'reasonably incident' to prospecting, mining, or processing operations," and Petitioner has not shown the prospecting, mining, or processing operations constitute UUD under 43 C.F.R. §3809.5. UUD is not the equivalent of *no* impact. The Tenth Circuit has held FLPMA does not require BLM to manage all public lands to accommodate every use or resource. *See Rocky Mountain Oil and Gas Ass'n v. Watt*, 696 F.2d 734, 738 (10th Cir. 1982).

In determining the Project is not expected to create a population level effect on the Wyoming pocket gopher, BLM relied on a 2005 report prepared for the agency to assess the natural history and conservation issues relating to this species.[14] In 2006, a report likewise assessing conservation issues relating to the Wyoming pocket gopher was prepared for the Forest Service.[15] Petitioner contends consideration of the 2006 report is "critical" because it contains more detailed information regarding the species and provides specific recommendations to federal agencies to protect pocket gopher habitat from adverse impacts that could threaten its survival in Wyoming. Specifically, Petitioner claims the 2006 report's authors found that the types of habitat disturbances caused by the Project may indeed result in significant and adverse impacts to the species population. (*See* A.R. 42470-71) (suggested measures for minimizing disturbance to pocket gopher habitat).

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[14] G.P. Beauvais and D.N. Dark-Smiley, *Species Assessment for Wyoming Pocket Gopher (Thomomy's Clusius) in Wyoming*, prepared for U.S. Department of the Interior, Bureau of Land Management, Wyoming State Office (June 2005) ("2005 report") (A.R. 04780-04810).

Although the 2006 report contains more detailed information and suggests conservation measures that are not included in the 2005 report, there appears to be no substantive difference in the scientific information presented on the species that would undermine BLM's impacts analysis. As did the 2005 report, the 2006 report acknowledges "[a]lmost nothing is known about the Wyoming pocket gopher" and "the actual status of Wyoming pocket gopher populations is unknown due to the extreme paucity of data." (A.R. 42448, 04783.) The 2006 report admits it has some limitations:

> [I]nterpolation and extrapolation of these data must be done with caution. The information in this assessment should not be taken as definitive of the Wyoming pocket gopher in any particular area. Rather, it should be used as a guide to the range of biological parameters and behaviors possible for the species . . . .

(A.R. 42451.) The report further cautions:

> Immediate conservation action can be taken by limiting additional disturbance to areas containing known, active Wyoming pocket gopher burrow complexes.

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[15] D.A. Keinath and G.P. Beauvais, *Wyoming Pocket Gopher (Thomomys clusius): A Technical Conservation Assessment*, prepared for the USDA Forest Service, Rocky Mountain Region, Species Conservation Project (August 31, 2006) ("2006 report") (A.R. 42446-42483).

> However, effective long-term conservation requires a better understanding of the species' distribution, ecology, and population status. For example, the habitat requirements of the species are vague and based largely on conjecture from incidental observations; so recommendations using this information are doomed to be similarly vague. Once such gaps are filled we can take the next logical steps to implement a conservation plan, namely habitat preservation and population monitoring.

(A.R. 42448.) The 2006 report's suggested mitigation measures are likewise qualified:

> Given the incredible lack of knowledge regarding the Wyoming pocket gopher, it is very difficult to suggest how habitat should best be conserved; we do not even have a good understanding of what suitable habitat is.

(A.R. 42470.) Thus, the measures proposed in the 2006 report are not based on any new information regarding the species that differs from the 2005 report, but rather are simply professional "best guesses" based on the little information known about the species.

The 2006 report advises that soil disturbance from road construction and extractive industries may impact pocket gopher habitat. (A.R. 42470.) Yet, BLM was already aware of these factors by virtue of its own 2005 conservation assessment on the pocket gopher (written by one of the same authors as the Forest Service 2006 report). The 2005 report (which was already in the record) advises that threats to pocket gophers include "soil disturbance and compaction due to increased petroleum exploration and extraction." (A.R. 04800.) The same 2005 report acknowledges that "[i]n this context, increased road densities and abundances that accompany petroleum development may be more of a threat than the construction of well-pads and pipelines." (*Id.*) Accordingly, the 2006 report does not provide any significant new information that was not already in the record and adequately considered by BLM.[16] Therefore, Petitioner can show no prejudice from BLM's failure to consider the 2006 report. *See Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1165 (10th Cir. 2012) ("even if an agency violates the APA, its error does not require reversal unless a plaintiff demonstrates prejudice resulting from the error").

CONCLUSION

"NEPA itself does not mandate particular results, but simply prescribes the necessary process. If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Methow Valley*, 490 U.S. at 350 (internal citations omitted). *See also Comm. to Pres. Boomer Lake Park v. Dep't of Transp.*, 4 F.3d 1543, 1554 (10th Cir. 1993) ("NEPA is essentially procedural in that it does not require major federal actions to have no significant environmental impact, it only requires that the environmental impacts be considered in the decision process."). NEPA merely guards against "uninformed – rather than unwise – agency action." *Methow Valley*, 490 U.S. at 351.

Extensive and exhaustive reviews of the potential environmental impacts of this Project and

[16] Petitioner relies heavily on the Magistrate Judge's finding, in granting Petitioner's motion to supplement the record with the 2006 report, that the 2006 report was a "relevant factor" not considered by BLM. *Order Granting Petitioner's Motion to Supplement and Amend the Administrative Record* at 6 (ECF No. 59). However, the Magistrate Judge recognized, "At this stage of the proceedings, [] the Court is not to decide whether the BLM adequately considered the Wyoming pocket gopher conservation issues, for that is one of the ultimate decisions before the District Court in the [Petitioner's] Petition. . . . The Court finds since the Report was presented to the BLM during the comments period, and goes into much more detail about the issues surrounding the Wyoming pocket gopher, the Report may be useful for the District Court to determine whether or not BLM failed to take the required hard look at direct, indirect, and cumulative impacts to Wyoming pocket gophers[.]" *Id.* at 5-6 (internal quotations omitted). The Court finds the Magistrate Judge's rulings on supplementation of the record do not bind this Court's determination of whether BLM's decision is arbitrary and capricious.

the cumulative impacts of others were undertaken by BLM, in conjunction with other State and Federal agencies. BLM's issuance of the ROD in this case was made after having taken a hard look at all reasonably foreseeable environmental impacts arising from operation of the Project. As recently observed by the Tenth Circuit Court of Appeals, “[i]t is not within our authority to resolve whether BLM selected the best or wisest option. The agency considered a reasonable range of alternatives, and its analysis met the minimum threshold necessary to constitute a ‘hard look’ at the consequences of its action[].” *Western Watersheds*, 721 F.3d at 1273. Moreover, the administrative record in this matters fails to reveal that in approving the Project BLM failed its obligation to prevent any unnecessary or undue degradation of the lands. To the contrary, the adoption of various mitigation measures and the selection of the preferred alternative reinforce a finding that BLM took a hard look at the Project and identified ways to avoid unnecessary and undue degradation.

The Court finds BLM’s decision to authorize the Lost Creek In-Situ Uranium Recovery Project meets the requirements of NEPA and FLPMA and is not arbitrary, capricious, an abuse of discretion, or otherwise in violation of the law. THEREFORE, it is hereby

ORDERED that the relief requested in the *Petition for Review* is DENIED.

Dated this 18th day of September, 2013.

Scott W. Skavdahl
United States District Judge